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Date: JUNE 29, 2000

Case No.: 1999-LHC-2180

OWCP No.: 08-111781

In the Matter of

MARK FONTENOT

Claimant

v.

GULF COPPER & MANUFACTURING CO.

Employer

and

INSURANCE CO. OF THE STATE OF PENNSYLVANIA

Carrier

APPEARANCES:

QUENTIN D. PRICE, ESQ.

For the Claimant

GREGORY L. DEANS, ESQ.

For the Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Mark Fontenot (Claimant) against Gulf Copper & Manufacturing Co. (Employer) and Insurance Company of the State of Pennsylvania (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing issued scheduling a formal hearing on March 14, 2000, in Beaumont, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered fourteen (14) exhibits while Employer/Carrier proffered fifteen (15) exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on June 16, 2000. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on September 28, 1996.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on September 28, 1996.

5. That Employer/Carrier filed a Notice of Controversion on January 20, 1999.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr.___ ; Claimant's Exhibits: CX-___; and Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

6. That an informal conference before the District Director was held on November 18, 1998.

7. That Claimant received temporary total disability benefits from October 1, 1996 through May 31, 1998 at a compensation rate of $299.87 and a lump sum permanent partial disability payment, totalling $41,458.15.

8. That medical benefits for Claimant have been paid pursuant to Section 7 of the Act.

9. That Claimant reached maximum medical improvement on March 4, 1998 for his September 28, 1996 injury.

II. ISSUES

The unresolved issues presented by the parties are:

1. Nature and extent of disability.

2. Suitable alternative employment.

3. Average weekly wage.

4. Entitlement to medical/surgical expenses.

5. Attorney's fee, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant, who currently resides in Grove, Texas was thirty-eight years old at the time of the hearing. (Tr. 17). He completed nine or ten years of formal education. His past work experience includes positions as a rice foreman, a builder, a house framer, a foundry worker, roughneck and a rigger on an oil well. He has been employed as a manual laborer for the majority of his life and has never occupied a position where he sat for any substantial part of the work day. (Tr. 21-23).

Claimant testified that while employed by Eastman Forge from 1989 through 1991, he suffered injuries to his shoulder and lower back. (Tr. 22). He has two bulging disks in his back which resulted from bending and lifting and has undergone two surgeries to his left shoulder. (Tr. 23). He testified that his right

shoulder has had similar problems, but that it never required surgery. Claimant explained that he has stiffness, pain, numbness, and inflammation in both shoulders and his right shoulder hurts when he attempts to "hold up something, or anything over my head." (Tr. 24). He testified that certain activities such as tying his shoes have a negative effect on his injured shoulders and back and that the weather has an effect on the level of pain he experiences. (Tr. 26).

From May 19, 1996 through May 31, 1996, and again on September 19, 1996 through September 28, 1996, Claimant worked as an outside machinist and rigger for the Gulf Copper & Manufacturing Company. (Tr. 26). Claimant worked on ships, replacing valves, greasing drawworks, setting pumps, removing and replacing winches and generally working on hardware in and on ships. (Tr. 27). The demands of his employment required Claimant to lift up to fifty pounds, to climb ladders, to bend, squat and stoop. (Tr. 28-30). He testified he could not return and perform his former job. (Tr. 30).

On September 28, 1996, Claimant was told to go to the top of the ship and get some "chainfalls" and other tools to open the doors to the bottom deck of the ship. (Tr. 31). While doing so, he stepped on an air hose and turned his left ankle. He heard a "pop" and grabbed his ankle. As he hobbled and tried to catch his balance, he slipped, turned his right ankle on the air hose and fell on his rear end. Thereafter, Claimant placed his arms and shoulders over the railing of the ladder, trying to keep weight off of his ankles, and moved down to the deck of the ship and was soon afterward taken to the hospital. (Tr. 32-33).

After being taken to Tower Medical facility, Claimant was transferred to Park Place Hospital where he underwent x-ray examination and his ankles were splinted. (Tr. 34). Claimant was referred to and treated by Dr. Carl Beaudry who explained to him that he had severely strained both ankles and broken the fifth metatarsal on his left foot. Dr. Beaudry performed surgery on the right ankle. Id.

On March 4, 1998, Dr. Beaudry cleared Claimant to return to work. He was prescribed Vicodin and Celebrex for arthritic pain and restricted from standing for long periods of time and climbing, and was required to wear ankle braces and high-top shoes or boots for support. (Tr. 37). On cross-examination, Claimant confirmed that he did not aggravate his prior back and shoulder conditions as a result of his September 28, 1996 job injury. (Tr. 56-57). Claimant testified that he has restrictions of lifting, bending and squatting because of his prior back and shoulder injuries. (Tr.

57-58). Claimant testified that he has painful arthritis in both of his ankles. (Tr. 38). He has problems driving a car because his back is aggravated as well as his ankles from pushing the pedals. If he sits for a period of time longer than forty-five minutes he experiences pain in his back and legs. (Tr. 40). He cannot stand for more that thirty minutes without having to sit because of pain. (Tr. 40). He has problems lifting any weight because of shoulder and back pain. Id.

Claimant also confirmed that he is and was at the time of the injury receiving treatment for his prior back injury with Beaumont Neurosurgical and Spine Associates. (Tr. 75). He stated that his ankles throb if he sits for "a long time" and will go numb. He also testified that the back of his legs go numb but did not know if his back condition caused the numbness. (Tr. 76). Claimant stated he tried to do laundry but was unable to because the bending over and standing for long periods of time hurt his back and feet. (Tr. 78).

In 1998, Claimant attempted to obtain numerous different kinds of employment. He first attempted to obtain employment with Gulf Copper, his former employer. When his application was denied, he applied for positions at Burger King, Waffle House, a temporary agency, Action Contract Services, Wyatt Field Service Company, A & B Builders, the Tamale Company, Triple S Industries, ConEX, Brown & Root Construction Company, H.B. Zachry Construction Company and Delta Security. (Tr. 42-46). He was not given employment in any of these positions and testified that he was not contacted in response to his submission of applications. Employer has not contacted him about any employment which would fit his physical restrictions. (Tr. 46).

Claimant was able to obtain employment at two companies, American Sandblasting & Coating and at Premier, Incorporated. Shortly after Claimant's employment commenced with American Sandblasting & Coating, he was asked to climb onto a rig and when he informed his foreman he was unable to climb as result of his limitations, he was told the company could not use him. (Tr. 64). He never received a paycheck from American Sandblasting & Coating. (Tr. 47). At Premier, Incorporated, Claimant's duties involved sweeping the shop. He attempted to do this work for three to four days, but because of the strain on his ankles resulting from constant standing and walking he was unable to do the job. Claimant testified that he did not believe that he would ever be able to do heavy labor work again because of his limitations. (Tr. 48-49).

After receiving Ms. Starr's labor market survey dated February 21, 2000, Claimant applied for positions at the convenience stores and gas stations RaceTrac, Conoco, E-Z Mart and Exxon. (Tr. 51-55). He has also applied for positions at Howell Furniture Gallery and at Technical Research Staffing Services. (Tr. 82-83). He testified that he has trouble filling out the applications because he has minimal reading and writing skills and that he is helped by his girlfriend in applying for these positions. (Tr. 54). He has testified that if given the opportunity he would work in any capacity to the best of his ability, but he would not do anything to aggravate his condition. (Tr. 61).

The Medical Evidence

Carl J. Beaudry, M.D.

Dr. Carl J. Beaudry, a board-certified orthopaedic surgeon and Claimant's primary treating physician, was deposed by the parties on February 18, 2000 in Port Arthur, Texas. (EX-D, p. 3). Dr. Beaudry testified that he initially treated Claimant on September 30, 1996, based upon the referral from Tower Medical Clinic. (EX-A, p. 3). At that time, Claimant reported being injured on September 28, 1996 when he tripped over a hose aboard ship and sustained injuries to both ankles and feet. (EX-D, p. 9). The examination revealed moderate swelling over the lateral ligament of the right ankle and no evidence of gross instability. (EX-A, p. 3). Dr. Beaudry's provisional diagnosis at the time was that Claimant had suffered "acute, grade I ankle sprain, lateral ligament, right ankle; very mildly displaced fracture of the base of the fifth metatarsal of the left foot; and sprained joints in the right lower extremity." Id. He concluded that the injuries sustained by Claimant were consistent with the history provided to him.

Claimant was treated conservatively with splints and the wearing of a cast for approximately six weeks. (EX-D, p. 10). During the period of rehabilitation, Claimant was treated with anti-inflammatories as well as analgesics, which he still takes today. Id. Dr. Beaudry explained that he was aware of Claimant's pre-existing injuries to his shoulders and back and that Claimant was presently being treated at Beaumont Neurological and Spine Clinic. (EX-D, p. 39).

At a follow-up visit on October 1, 1996, x-rays revealed that Claimant's metatarsal fracture had suffered slight increasing displacement. Claimant's cast was replaced and Dr. Beaudry consulted Claimant about conservative non-surgical options. (EX-A, p. 4). On October 16, 1996, Claimant complained of pain in the

left calf area which was tender to palpation. There was no evidence of gross swelling and testing returned negative results. (EX-A, p. 4). On November 18, 1996, a second x-ray of the left foot revealed the fracture to be in good position and showed evidence of early bone consolidation. Clinical examination of the ankles revealed little to no change and Claimant was advised to continue using crutches with partial weight bearing as he could tolerate. (EX-A, p. 8). On December 12, 1996, Claimant told Dr. Beaudry that he had experienced severe pain over the lateral aspect of his ankle and foot while using his crutches. Examination revealed residual tenderness to palpation over the right foot. Claimant was referred to physiotherapy and given a "walking boot." Id. At this time, Dr. Beaudry opined Claimant was temporarily and totally disabled.

On January 2, 1997, a follow-up x-ray of Claimant's ankle and foot revealed the fracture line still visible. Claimant was still very tender and was advised to continue conservative treatment. On January 23, 1997, Dr. Beaudry reported Claimant's condition to be unchanged. (EX-A, p. 10). On February 24, 1997, Claimant continued to complain of pain, but stress films revealed no evidence of instability. They did, however, confirm the presence of an "os vesalium" and a small bone chip over the medial malleolus. Id. On March 24, 1997, Dr. Beaudry's examination revealed no gross evidence of instability but Claimant continued to complain of pain and of "giving away and popping" in the ankle joints. (EX-A, p. 11). Claimant remained temporarily and totally disabled from returning to work. An MRI was ordered which was deemed "grossly within normal limits." When Claimant returned on May 27, 1997, he continued to complain of chronic pain and swelling. Another x-ray of the foot was ordered, revealing the possibility of a non-united fracture in the left foot. Dr. Beaudry was very doubtful that Claimant could return to normal work and he ordered an assessment of functional capacity as well as an electromyogram of the lower extremities. (EX-A, p. 14).

In July 1997, Dr. Beaudry referred Claimant to Dr. Sacks, a physiologist, for an assessment and an electromyogram of Claimant's lower extremities. Dr. Sacks agreed that Claimant had sustained bilateral ankle sprains and found Claimant was also suffering from tarsal tunnel syndrome on the right side and had stretch injuries to his deep and superficial peroneal nerves. (EX-D, p. 11). He was treated with the wearing of special shoes and steroid injections. Dr. Beaudry opined Claimant was a possible candidate for surgery. Claimant was admitted to Park Place Hospital on August 15, 1997 to undergo tarsal tunnel decompression, which was performed by Dr. Beaudry. Id. Dr. Beaudry reported that Claimant experienced significant improvement in his condition as a result of

the surgical procedure. However, Claimant currently remains symptomatic in both lower extremities. Claimant returned on September 22, 1997, at which time Dr. Beaudry noted marked improvement in Claimant's pain. Claimant was advised to continue his physical therapy treatment. (EX-A, p. 16).

On October 24, 1997, Claimant was re-evaluated by Dr. Beaudry, at which time, he complained of weakness in his foot and ankle. He was prescribed heel cups to insert into his shoes. On this date, Dr. Beaudry opined that Claimant was totally and permanently disabled from his regular duties. (EX-A, p. 18). On November 24, 1997, Claimant informed Dr. Beaudry that he had re-injured his ankle while practicing his exercises on a stationary bicycle. Claimant was asked to discontinue his treatment temporarily. (EX-A, p. 19). On January 26, 1998, Claimant complained of chronic pain and swelling. An MRI and x-ray revealed the bone in the foot to be united. Claimant was diagnosed with chronic ankle sprain with accompanying healing fracture, and post-tarsal tunnel syndrome. (EX-A, p. 20). On March 4, 1998, Dr. Beaudry reported Claimant had reached maximum medical improvement. He was deemed permanently and totally disabled from returning to his previous occupation. Id.

One year later, on February 1, 1999, Claimant returned for treatment, at which time Dr. Beaudry noted Claimant's condition remained unchanged. Claimant continued to complain of chronic pain and instability which made it difficult for him to stand or walk for any significant period of time. At this time, Dr. Beaudry noted that he has "little more to offer Claimant." Further examinations by Dr. Beaudry on May 28, 1999, August 30 1999, and December 2, 1999, revealed Claimant's condition unchanged. (EX-A, pp. 24-27).

Dr. Beaudry explained Claimant had undergone several other investigative treatments, including MRIs and a CAT scan over the left foot which revealed an incompletely healed fracture at the base of the fifth metatarsal. (EX-D, p. 12). Dr. Beaudry saw Claimant once every two months over a period of three years. Claimant continued to complain of a persistent, severe, burning pain over the feet. He also complained of shooting pains in both ankles, and of popping sensations in his left lower extremities. Id.

On February 2, 2000, Claimant last saw Dr. Beaudry, at which time Dr. Beaudry recommended a bone scan. (EX-A, p. 27). This procedure, however, was not authorized by Carrier. Dr. Beaudry explained that a bone scan would determine whether or not the injuries sustained to Claimant's extremities had resulted in post-

traumatic inflammatory arthritic changes. (EX-D, p. 16).

Specifically, Dr. Beaudry was concerned with Claimant's foot injury. He explained upon examination that the fifth metatarsal, while a relatively small bone, becomes suddenly very important when it is not working correctly. (EX-D, p. 17). He explained that even when treated properly, small bones such as the scaphoid bone in the wrist, or the metatarsal, can cause "disastrous results." Dr. Beaudry examined the report of Dr. Perlman, who evaluated Claimant on behalf of the Department of Labor and concluded that Dr. Beaudry's recommended bone scan was unnecessary because Claimant had already undergone an MRI and a CAT scan. Dr. Beaudry re-affirmed that the reason he recommended a bone scan was to determine what had transcended and changed in Claimant's ankle and foot over the course of the three or four years since the aforementioned tests were run. (EX-D, p. 18).

Dr. Beaudry testified he completed a OWCP-5 form based on Claimant's feet and ankle injuries wherein he restricted Claimant from certain activities during an eight-hour work day. On the form, Dr. Beaudry restricted Claimant from sitting more than two hours, from walking more than one hour, and from bending more than one hour in an eight hour work day. (EX-D, p. 14). Furthermore, Claimant was restricted from squatting, climbing, kneeling, carrying or lifting weights over ten pounds, from pushing and pulling and from activities that might involve high speed working or environments where Claimant would experience dampness and cold. (EX-D, p. 15). Dr. Beaudry testified that Claimant is totally and permanently disabled from carrying out his former occupation which is very physically demanding, involving weight lifting, climbing, working in obscure positions and in all weather conditions. (EX-D, p. 16).

On cross-examination, Dr. Beaudry testified that he could "probably live with" Claimant standing two hours out of an eight hour day provided that the intervals of sitting, standing, and walking were frequent. (EX-D, p. 30). He concluded Claimant could be employed in a sedentary position, provided enough breaks of walking or standing were provided so that Claimant would not tire or experience excessive pain. (EX-D, pp. 32-33).

In determining Claimant's impairment rating, Dr. Beaudry referred Claimant to Dr. Haig. Dr. Beaudry explained this was his customary procedure and that through this practice he was able to lessen the risk of unobjective ratings. (EX-D, pp. 22, 26). Dr. Beaudry concluded, based on his treatment of Claimant, and the opinion of Dr. Haig, that Claimant had reached maximum medical improvement on May 12, 1998. (EX-D, p. 13). However, on cross-

examination, Beaudry agreed that officially, based on a report dated March 23, 1998, and in agreement with Dr. Haig, Claimant had reached maximum medical improvement on March 4, 1998. (EX-D, pp. 23-24).

Mark Perlman, M.D.

Claimant was examined by Dr. Mark Perlman, an orthopaedic surgeon, on December 5, 1998, at the behest of the Department of Labor. Examination of Claimant's lower extremities revealed Claimant's gait was slow and he took short strides. The right ankle demonstrated a well-healed incision posterior to the medial malleolus. Claimant was found to have slightly restricted range of motion in both the right and left lower extremities. Claimant was unable to perform a right foot, single heel raise. He was markedly tender to palpation on the left foot. (EX-B, pp. 9-12). Dr. Perlman reported that Claimant's broken foot bone had healed. He further noted that Claimant experienced ankle and foot pain and diagnosed him with post-surgical tarsal tunnel syndrome and mild ankle sprains with no residual instability. (EX-B, pp. 12-13).

Dr. Perlman stated Claimant's complaints are mostly subjective in nature. While slight abnormalities were noted, the injuries complained of seemed to be well-healed. Furthermore, Dr. Perlman concluded Claimant had reached maximum medical improvement, and that further testing, including a bone scan, would not be necessary. He opined that Claimant should return to work, but not as a rigger. He believed Claimant was incapable of climbing and that Claimant should not stand or walk for longer than one hour at a time. Furthermore, Dr. Perlman opined Claimant would be only under temporary restrictions and that his condition would improve. He remarked that he did not see "any pre-existing condition aggravating his present condition." (EX-B, p. 13).

Martin Haig, M.D.

Upon referral from Dr. Beaudry, Claimant was examined by Dr. Haig, a board-certified orthopaedic surgeon, on May 13, 1998. Dr. Haig states in his report of the examination that Claimant's right ankle, with the exception of the scar from the tarsal tunnel procedure, was well-healed. The scar, however, was tender, and eversion of the ankle, which puts pressure on the ankle, caused pain. Dr. Haig remarked Claimant was able to stand on his tiptoes and heels. X-rays showed an incomplete united fracture on the base of the fifth metatarsal, with non-united bony fragments, which he opined is common in fractures of this type. Dr. Haig opined Claimant could perform any type of light to medium work. (EX-C, pp. 5-6).

Furthermore, Dr. Haig assigned Claimant a 15% permanent impairment rating to the right ankle, based on the tarsal tunnel procedure, and a 10% permanent impairment rating to the left foot caused by the non-united fracture at the base of the fifth metatarsal. (EX-C, p. 7). Dr. Haig included this information in the Texas Workers' Compensation Commission report of Claimant's medical evaluation. (EX-C, p. 8). Additionally, in response to correspondence regarding Claimant's vocational capacity, Dr. Haig reported Claimant could stand or walk for four hours of the day and could drive seven hours of the day. Dr. Haig opined Claimant could do other activities, such as climbing or stooping in limited capacity. (EX-C, p. 10). He further opined Claimant was capable of lifting up to fifty pounds occasionally and could perform activities involving manipulation of the hands. (EX-C, p. 11). In correspondence from Dr. Haig to Carrier, he opined that due to Claimant's limited physical capabilities, he required "re-education to a new occupation." (EX-C, p. 14).

The Vocational Evidence

Patti Starr

Ms. Starr, who was present at the formal hearing, did not testify in this matter. She is a licensed and certified vocational rehabilitation counselor, who was retained by Employer to conduct an assessment of Claimant's employability. (EX-H). She conducted three separate labor market surveys, dated November 30, 1999, February 21, 2000, and March 13, 2000.

In the November 30, 1999 labor market assessment, Ms. Starr identified the following positions:

Helena Labs - production assembly, print shop
Technical Resource - light industrial
RaceTrac - clerk
Ellis Pottery -custom picture framing
Sure Page - page repair technician
Kinsel Motor - greeter
Copy Right - copying technician
Howell Furniture Gallery - furniture refinisher
TriSupply - wood worker
Cascio Copy Shop - copier technician
Today's Photo - photofinisher
Texas State Optical - lens grinder
Green Lawn Memorial Park - appointment setter
Chuck E. Cheese - game room attendant
Home Security - appointment setter
Radio Shack - clerk/technician

Conoco - clerk
E-Z Mart - clerk
Exxon - clerk
Market Basket - clerk

(EX-H, pp. 11-12). Ms. Starr also identified the following general job positions: bike mechanic; mechanics helper; telemarketer; appointment setter; medical supplies technician; locksmith; assistant mechanic; and cabinet maker. (EX-H, p. 12). She further noted that in reviewing Claimant's transferable skills, 21 potential employers in the category of locksmith were available; 7 potential employers for engravers; 10 potential employers for photo finishers; and 12 potential employers for photocopying machine operators. Id. In her survey, Ms. Starr noted that the list of potential employers and identified positions was "a limited sampling of the positions available within [Claimant's] skills, education and physical capabilities." Id.

On February 21, 2000, Ms. Starr issued an additional labor market survey providing more specificity as to the previously submitted November 30, 1999 survey. In this report, Ms. Starr reported hourly wage rates for some of the positions, which are noted hereinbelow. She also identified the previously available positions as filled:

Helena Labs - production assembly, print shop
Ellis Pottery -custom picture framing ($5.15/hr)
Sure Page - page repair technician ($6.00/hr)
Kinsel Motor - greeter ($5.15/hr)
Copy Right - copying technician ($5.15/hr)
TriSupply - wood worker ($6.00/hr)
Cascio Copy Shop - copier technician ($6.50/hr)
Today's Photo - photofinisher ($5.15/hr)
Green Lawn Memorial Park - appointment setter ($5.25/hr)
Chuck E. Cheese - game room attendant
Home Security - appointment setter ($7.00/hr)

The availability of the following positions was noted as "accepting applications" or prospective employees had to "call for appointment:"

Technical Resource - light industrial ($5.56/hr)
RaceTrac - clerk ($5.75/hr)
Howell Furniture Gallery - furniture refinisher
Texas State Optical - lens grinder ($5.15/hr)
Radio Shack - clerk/technician ($5.15/hr)
Conoco - clerk
E-Z Mart - clerk ($5.15/hr)

Exxon - clerk ($5.75/hr)
Market Basket - clerk

(EX-H, pp. 5-6).

With respect to the general job positions identified in the November 30, 1999 survey, Ms. Starr provided the names of each potential employer and noted that each position was accepting applications:

Kickstand Bike Shop - bike mechanic
Eastex Exxon Car Care Center - assistant mechanic
J.C.'s - telemarketer ($6.50/hr)
AppleOne - telemarketer
Vinyl Masters of Texas - telemarketer ($6.00/hr)
American Personnel - telemarketer/appt. setter ($5.56/hr)
Scooters Plus - repairman
Best Safe and Lock - key maker/service rep ($5.15/hr)

(EX-H, p. 8).

Finally, in a follow-up report to Employer's counsel dated March 13, 2000, Ms. Starr addresses Mr. Kramberg's rebuttal of the positions previously identified by her on November 30, 1999 and February 21, 2000. (EX-O). She disagrees with Mr. Kramberg's conclusion that Claimant is unable to perform any of the identified positions based upon his skills, education, work history and limited physical capacities. It should be noted that Ms. Starr does not address any job positions in this follow-up report.

William J. Kramberg

Mr. Kramberg, a licensed and certified vocational rehabilitation counselor, was retained by Claimant to rebut the findings of Ms. Starr with respect to suitable alternative employment. (CX-14). Although present at the formal hearing, he did not testify in this matter. He opined that none of the positions identified by Ms. Starr were suitable or appropriate for Claimant due to the following reasons:

Helena Labs - physical demands and requirements.
Technical Resource - job requirements change; no position available.
RaceTrac - skills, abilities and physical demands.
Ellis Pottery - experience, skills and job requirements.
Sure Page - skills and abilities.
Kinsel Motor - no such position exists.
Copy Right - physical demands.

Howell Furniture Gallery - skills and experience.
TriSupply - physical demands, skills and experience.
Cascio Copy Shop - physical demands.
Today's Photo - physical demands.
Texas State Optical - educational issues, skills and abilities.
Greenlawn Memorial Park - experience issues, skills and abilities.
Chuck E. Cheese - no such position exists.
Edison Home Security - educational issues, skills and abilities.
Radio Shack - physical demands, skills and abilities.
Conoco - physical demands.
E-Z Mart - employer no longer in business.
Exxon - physical and educational demands.
Market Basket - skills, abilities and physical demands.
Kickstand Bike Shop - no answer at business.
Eastex Exxon - educational issues and physical demands.
J.C.'s - call was never returned.
AppleOne - experience and skills.
Vinyl Masters - call was never returned.
American Personnel - skills and abilities.
Scooters Plus - educational requirements and physical demands.
Best Safe and Lock - physical demands, skills and abilities.

Mr. Kramberg additionally stated in a letter dated March 6, 2000 that Claimant's literacy skills are marginal and may be indicative of a learning disability. (EX-13, p. 1). He opined that none of the positions identified by Ms. Starr are suitable or appropriate for Claimant, given his work restrictions, literacy limitations, lack of a high school diploma and the job requirements of each position. (EX-13, p. 2).

The Contentions of the Parties

Claimant argues that due to work-related injuries, he is unable to return to his former occupation as a machinist/rigger and is therefore totally and permanently disabled. He further argues that Employer failed to establish suitable alternative employment because the labor market surveys fail to document with specificity the physical and mental requirements and/or physical and functional demands of the work to be performed. Additionally, Claimant maintains that he has exercised reasonable diligence in attempting to secure some type of suitable alternative employment and expressed a willingness to return to work, but has been unable to secure employment due to his physical condition. Claimant argues two different methods (under Section 10(a) and 10(c)) for calculating his average weekly wage, yielding an average weekly

wage of $506.48 or $232.17, respectively. Finally, it is contended that the bone scan, which was recommended by Dr. Beaudry, is a reasonable and necessary expense for the treatment of Claimant and, therefore, Employer should be liable for the costs of this diagnostic test.

Employer/Carrier agree that Claimant cannot return to his former employment as a machinist/rigger. However, it is argued that a overwhelming number of suitable alternative employment opportunities was found by Ms. Starr and thus, Claimant is entitled to permanent partial disability compensation benefits. Employer/Carrier further maintain Claimant failed to diligently search for or obtain alternative employment and thus is precluded from permanent total disability benefits. Additionally, Employer/Carrier urge calculation of Claimant's average weekly wage under Section 10(c) based upon his 1996 earnings, which would yield the most fair and reasonable weekly wage of $83.50. It should be noted that Employer/Carrier alternatively advocate five other methods by which to determine Claimant's average weekly wage which are discussed more thoroughly hereinbelow. Finally, Employer/Carrier maintain that the bone scan recommended by Dr. Beaudry is unreasonable and unnecessary and, therefore, they should not be liable for this diagnostic test.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. V. Vozzolo, Inc. v. Britton, 377 F. 2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 661 F. 2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffered from a compensable injury, namely ankle injuries, when he fell on September 28, 1996 in the course and scope of his employment. The burden of proving the nature and extent of his disability, however, rests with Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept. Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra., at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F. 2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a prima facie case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty

Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994). Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, ftn 5. (1985); Trask v. Lockheed Shipbuilding Construction Co., supra.; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the event of an injury to a scheduled member, a claimant's permanent partial disability under Section 8(c) is confined to the schedule and wage-earning capacity is irrelevant. A foot injury resulting in permanent partial disability is compensated pursuant to the schedule at Section 8(c)(4). 33 U.S.C. § 908(c)(4). The Board and the Courts have consistently held that a scheduled award runs for the proportionate number of weeks attributable to the loss of use of the member at the full compensation rate or as here, the average weekly wage. Nash v. Strachan Shipping Co., 15 BRBS 386, 391 (1983), aff'd in relevant part but rev'd on other grounds, 760 F.2d 569, 17 BRBS 29 (CRT) (5th Cir. 1985), aff'd on recon. en banc, 782 F.2d 513, 18 BRBS 45 (CRT) (5th Cir. 1986); see also Gilchrist v. Newport News Shipbuilding & Dry Dock Co., 135 F.3d 915 (4th Cir. 1998).

However, if the claimant establishes that he is permanently or temporarily totally disabled, he may recover benefits under Section 8(a) or (b). Id. at n. 17; 33 U.S.C. § 908(a)-(b); Potomac Electric Power Co. (PEPCO) v. Director, OWCP, 449 U.S. 268, 101 S.Ct. 509 (1980); Winston v. Ingalls Shipbuilding, Inc., 16 BRBS 168, 172 (1984); Sketoe v. Dolphin Titan International, 28 BRBS 212 (1994).

The Board and the Courts have long held that an award under the schedule of the Act may not coincide with an award for permanent total disability because the latter presupposes the loss of all wage-earning capacity. Turney v. Bethlehem Steel Corp., supra; Frye v. Potomac Electric Power Co., 21 BRBS 194, 198 n.2 (1988). Since the principle of compensation under the Act is generally to provide for an award to compensate for loss of earning capacity, it has been recognized that a claimant cannot be **more than** totally disabled or receive compensation which exceeds that payable to the claimant in the event of total disability. Turney, supra; ITO Corp. of Baltimore v. Green, 185 F.3d 239, 243 (4th Cir. 1999). It would be inconsistent with the wage-earning capacity principle to allow an award for scheduled permanent partial disability to co-exist with temporary total disability. Davenport v. Apex Decorating Co., Inc., 18 BRBS 194, 197 (1986).

As the Fourth Circuit recognized "...[T]he presumed effect of scheduled disabilities on a claimant's wage-earning capacity has been set by Congress within a fairly narrow range. Benefits are payable for a specific duration regardless of the actual impact of the disability on the claimant's prospects of returning to longshore (or any other) work." ITO Corp. of Baltimore, supra. at 242. Thus, the claimant is entitled to compensation for a scheduled injury without having to prove the deleterious effect, if any, of the injury on his potential to earn income. Id. Conversely, when the disability is to a non-scheduled area, the claimant is required by Section 8(c)(21) to show diminished capacity to earn wages. Metropolitan Stevedore Co. v. Rambo, 515 U.S. 291, 297, 115 S.Ct. 2144 (1995).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

The parties stipulated that Claimant reached maximum medical improvement with respect to his ankle injuries on March 4, 1998. (JX-1). The medical records of evidence, in particular Dr. Beaudry's records, support the parties' stipulation and therefore, I find Claimant reached maximum medical improvement on March 4, 1998. (EX-A, p. 20). Thus, all periods of disability prior to March 4, 1998 are considered temporary under the Act.

It is further undisputed by the parties that Claimant is unable to return to his former employment as a machinist and/or rigger. The medical evidence, particularly the well-reasoned opinions of Drs. Beaudry, Perlman and Haig, supports this conclusion. (EX-A, p. 20; EX-B, pp. 12-13; EX-C, pp. 5-6). Furthermore, Claimant credibly testified that he is unable to

perform the physical duties required by machinist and/or rigger work. (Tr. 37-40). Therefore, based on the persuasive medical opinions of Drs. Beaudry, Perlman and Haig and Claimant's credible testimony, I find that Claimant has established his inability to return to his usual employment, namely rigger work. Accordingly, since Claimant has shown that he is unable to return to his former employment, he has established a prima facie case of total disability since March 4, 1998, the date he reached maximum medical improvement.

Based on the foregoing, Claimant is entitled to temporary total disability compensation benefits from September 28, 1996 through March 4, 1998, based on his average weekly wage, as calculated hereinbelow. Since Claimant has shown that his foot injuries render him totally disabled from performing his former job as a rigger, he is entitled to compensation for total disability under Section 8(b). PEPCO, supra. at 277 n. 17; Sketoe, supra. at 222. Thereafter, since suitable alternative employment was not established by Employer, as explicated more thoroughly hereinbelow, Claimant's disability status became permanent and total, entitling him to permanent total disability compensation benefits March 5, 1998 and continuing through present, based on his average weekly wage.

C. Suitable Alternative Employment

If the claimant is successful in establishing a prima facie case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F. 2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Turner, Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain

fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F. 2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F. 2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); see generally Bryant, supra; Fox v. West State, Inc., 31 BRBS 118 (1997). Should the jobs' requirements be absent, the administrative law judge will be unable to determine if the claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane, 930 F. 2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F. 2d at 1042-1043; P & M Crane, 930 F. 2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F. 2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F. 2d 1003 (5th Cir. 1978).

In the present matter, Employer relies on three labor market reports prepared by Ms. Starr, dated November 30, 1999, February 21, 2000 and March 13, 2000. Claimant, on the other hand, relies on the opinion of Mr. Kramberg, who opined that none of the positions identified by Ms. Starr constituted suitable alternative employment for the various reasons indicated hereinabove.

Based on the vocational evidence of record, I find that suitable alternative employment was not established by Employer and

Claimant's disability status is permanent and total after March 4, 1998, the date he reached maximum medical improvement.

Although Ms. Starr identified various employers and positions in the November 30, 1999 and February 21, 2000 labor market surveys, she failed to determine whether each employer would consider Claimant for employment, or more importantly, the physical and functional demands and job requirements for each position vis-a-vis Claimant's physical restrictions. Ms. Starr identified job positions, which she reported were consistent with Claimant's physical limitations, educational abilities and transferable skills. Although the positions identify a potential employer and sometimes an hourly wage rate, **all of the identified positions fail to document with specificity the physical and mental requirements and/or the physical and functional demands of the work to be performed**. As noted hereinabove, the precise nature and details of job opportunities must be established to allow a rational determination of its suitability and realistic availability by the undersigned fact finder. These positions identified by Ms. Starr fail to comport with **any** requirement whatsoever, and in particular, fail to comport with Claimant's work limitations and physical restrictions. Accordingly, I reject all of the positions identified by Ms. Starr and find that none of them constitute suitable alternative employment.

It should further be noted that I find Mr. Kramberg's opinion, albeit extremely brief and general, rebutting Ms. Starr's vocational efforts, persuasive. His assessment focused on Ms. Starr's complete lack of specificity in identifying the physical and functional requirements of each position. After interviewing Claimant, reviewing pertinent medical records and contacting as many of the potential employers as possible, Mr. Kramberg concluded that none of the positions were suitable or appropriate since they were not commensurate with Dr. Beaudry's work restrictions or Claimant's educational skills and abilities. It should be noted that Ms. Starr did not interview or meet with Claimant.

In light of the foregoing, I place greater weight on Mr. Kramberg's opinion and find that Employer failed to establish any suitable alternative employment for Claimant. Accordingly, because suitable alternative employment has not been properly established by Employer, I find that Claimant is permanently and totally disabled, entitling him to permanent total disability compensation benefits from March 5, 1998 and continuing through present. It should also be noted that since Employer failed to establish suitable alternative employment, the issue of whether Claimant engaged in a diligent and reasonable search for other employment opportunities is moot and need not be addressed in this Decision

and Order.

D. Scheduled Permanent Partial Disability

In determining the percentage of disability, an administrative law judge may evaluate a variety of medical opinions and observations in addition to the claimant's own description of the effects of his injury. Pimpinella v. Universal Maritime Service Incorporated, 27 BRBS 154, 159 (1993). Moreover, the Act does not require adherence to any particular formula for determining the extent of disability nor is an administrative law judge bound by any particular physician's opinion or any particular edition of the AMA Guides To The Evaluation of Permanent Impairment. Mazze v. Frank J. Holleran, Jr., 9 BRBS 1053, 1055 (1978); Rosa v. Director, OWCP, 141 F.3d 1178 (unpublished), 33 BRBS 121 (CRT) (9th Cir. 1998).

In the present matter, the parties do not dispute that Claimant suffered a scheduled injury to his left and right feet pursuant to Section 8(c)(4) of the Act. Claimant seeks permanent partial scheduled compensation based on a 15% impairment rating for his right foot and a 10% impairment rating for his left foot or a total of 25% assigned by his treating physician, Dr. Beaudry.

Under Section 8(c)(4) and (19), the loss of the use of his right and left feet entitle Claimant to 51.25 weeks (25% x 205 weeks = 51.25 weeks) of compensation for permanent partial disability, based on an average weekly wage of $112.98 for a total of $5,790.23. 33 U.S.C. § 908(c)(4). The parties stipulated that Claimant has already been paid a lump sum for 51.25 weeks of permanent partial disability.

E. Average Weekly Wage

Section 10 of the Act sets forth three alternative methods for calculating a claimant's average annual earnings, 33 U.S.C. § 910 (a)-(c), which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. SGS Control Services v. Director, OWCP, supra., at 441; Johnson v. Newport News Shipbuilding & Dry Dock Co., 25 BRBS 340 (1992); Lobus v. I.T.O. Corp., 24 BRBS 137 (1990); Barber v. Tri-State Terminals, Inc., 3 BRBS 244 (1976), aff'd sum nom. Tri-State Terminals, Inc. v. Jesse, 596 F.2d 752, 10 BRBS 700 (7th Cir. 1979).

Section 10(a) provides that when the employee has worked in the same employment for substantially the whole of the year immediately preceding the injury, his annual earnings are computed using his actual daily wage. 33 U.S.C. § 910(a). Section 10(b) provides that if the employee has not worked substantially the whole of the preceding year, his average annual earnings are based on the average daily wage of any employee in the same class who has worked substantially the whole of the year. 33 U.S.C. § 910(b). However, if neither of these two methods "can reasonably and fairly be applied" to determine an employee's average annual earnings, then resort to Section 10(c) is appropriate. Empire United Stevedore v. Gatlin, 935 F.2d 819, 821 (5th Cir. 1991).

Section 10(c) explicitly provides that a "claimant's average annual earnings under this subsection shall have regard for his earnings at the time of the injury." Hayes v. P & M Crane Co., 23 BRBS 389, 393 (1990). Accordingly, it may be reasonable to focus only on the actual earnings of the claimant at the time of the injury. Id.

The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). Hayes, supra; Hicks v. Pacific Marine & Supply Co., Ltd., 14 BRBS 549 (1981). It should also be stressed that the objective of Section 10(c) is to reach a fair and reasonable approximation of a claimant's wage-earning capacity at the time of injury. Barber v. Tri-State Terminals, Inc., supra. Section 10(c) is used where a claimant's employment is seasonal, part-time, intermittent or discontinuous. Empire United Stevedores, supra.

In determining Claimant's average weekly wage, the evidence of record does not establish that Claimant worked in the same employment for substantially the whole of the year immediately preceding the injury. Nor does the record contain sufficient evidence to make a determination of his average daily wage under either subsection (a) or (b). Since the record is devoid of a consistent five or six day per week work schedule, an average daily wage cannot be determined by the undersigned pursuant to Section 10(a), which I find to be inapplicable. Moreover, Section 10(b) is inapplicable as well because the record does not contain any evidence of any wage records of other employees in the same class as Claimant. Therefore, I conclude that since Sections 10(a) and (b) cannot be applied, Section 10(c) is the most appropriate standard under which to calculate Claimant's average weekly wage in this matter.

Claimant contends that his average weekly wage should be based strictly on the wages he earned while working for Employer. He

proposes using a "modified 10(a) formula," stating that he worked 18 days for Employer and earned $1,580.25, which equals an average daily wage of $87.79 ($1,580.25 ÷ 18 = $87.79). (CX-12, pp. 6, 12-17). Claimant then multiplied his average daily wage by 300 days, contending he is a five-day per week worker, which equals an average annual earning capacity of $26,337.00 ($87.79 x 300 = $26,337.00). Finally, by dividing this figure by 52 weeks, Claimant's average weekly wage would be $506.48 ($26,337.00 ÷ 52 = $506.48).

As noted hereinabove, the record is devoid of any evidence whatsoever establishing that Claimant worked a consistent five or six day per week work schedule. Thus, an average daily wage cannot be determined by the undersigned pursuant to Section 10(a). It should also be noted that not only do I find Claimant's initial average weekly wage calculation to be artificially high, but also extremely inconceivable given the fact that Claimant never earned more than $4,000.00 per year from 1976-1997, except in 1989, 1990 and 1991.

Alternatively, Claimant contends that the undersigned should utilize Claimant's wages earned between 1989 and 1991 and between 1993 and 1996 to arrive at a fair average weekly wage. Claimant worked four full years in 1989 ($19,764.00), 1990 ($27,103.00), 1994 ($45.00) and 1995 ($1,325.00); one-half of 1991 ($14,529.00); one-third of 1993 ($294.00); and three-fourths of 1996 ($4,342.00), for a total of $67,402.00.[2] (CX-12, p. 2). By dividing this figure by 5.583 years, Claimant arrives at an average annual earning capacity of $12,072.72, which is subsequently divided by 52 weeks, to arrive at an average weekly wage of $232.17 ($12,072.72 ÷ 52 = $232.17).

Employer/Carrier, on the other hand, initially contend that Claimant's average weekly wage should be based upon the 52 weeks immediately preceding the 1996 work injury. Since there is no evidence of the wages earned in 1995 which fell within the 52 week period preceding the date of injury, the average weekly wage would be based on Claimant's 1996 earnings, $4,342.00, which would yield an average weekly wage of $83.50 ($4,342.00 ÷ 52 = $83.50).

Alternatively, Employer/Carrier argue that the reported 1995 earnings, $1,325.00, could be extrapolated into the 1996 earnings

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[2] Claimant urges exclusion of the time he was not working due to a left shoulder and low back injuries, which kept him out of the work force at various times from June 4, 1991 through October 18, 1996 and November 8, 1991 through August 31, 1993. (CX-6, pp. 1-7; EX-M).

as follows: $1,325.00 ÷ 52 = $25.48 x 13.71 weeks = $349.33 (1995) + $4,342.00 (1996) = $4,691.33 ÷ 52 = $90.22.

An additional alternative method to determine Claimant's average weekly wage, as maintained by Employer/Carrier, would be to base the average weekly wage upon the 38.43 weeks worked in 1996 which preceded the date of injury, yielding an average weekly wage of $112.98 ($4,342.00 ÷ 38.43 = $112.98).

Yet another method argued by Employer/Carrier would be to use the last five years of reported earnings (1992-1996), which would result in an average weekly wage of $23.10 ($0.00 + $294.00 + $45.00 + $1,325.00 + $4,342.00 = $6,006.00 ÷ 5 = $1,201.20 ÷ 52 = $23.10).

Finally, Employer/Carrier contends that if Claimant's entire 21 year wage history was averaged, it would yield an average weekly wage of $85.23.

In determining Claimant's average weekly wage under Section 10(c), I find that using Claimant's earnings from 1996 yield the fairest determination of his average weekly wage. The 1996 wages span a period of 38.43 weeks, beginning January 1, 1996 and ending September 28, 1996, the date of Claimant's injury. Although the record is devoid of evidence establishing that Claimant worked each of the 38.43 weeks, I find that using a 52 week period, since he did not work 52 weeks in 1996, would result in an artificially low average weekly wage. It should further be noted that the undersigned is not including prior wage records from other years, in particular the earnings from 1992-1995, in the calculation because such earnings are extremely disparate and not necessarily indicative of Claimant's wage earning capacity and would consequently yield an unfair determination of his average weekly wage at the time of his injury. Thus, by using Claimant's 1996 earnings and dividing by 38.43 weeks worked, this calculation yields the fairest determination of an average weekly wage for Claimant. Accordingly, I find Claimant's average weekly wage to be $112.98 ($4,342.00 earned in 1996 ÷ 38.43 weeks worked in 1996 = $112.98).

Thus, Claimant is entitled to temporary total disability compensation benefits from September 28, 1996, the date of injury, through March 4, 1998, the date he reached maximum medical improvement and permanent total disability compensation benefits from March 5, 1998 and continuing through present, based on his average weekly wage of $112.98, as determined hereinabove.

Claimant also argues that should the undersigned find that Claimant's average weekly wage is less than the national average weekly wage, he should be entitled to the minimum compensation rate of $195.61.

Section 6(b)(2) of the Act provides:

> "Compensation for total disability shall not be less than 50 percentum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wage is as computed under Section 10 or less than 50 percentum of such national average weekly wage, **he shall receive his average weekly wages as compensation for total disability**."

33 U.S.C. § 906(b)(2).

In the present matter, I found Claimant's average weekly wage to be $112.98, which is less than 50% of the national average weekly wage. Thus, Claimant's argument is without merit and he is not entitled to the national minimum weekly wage of $195.61, but rather, to his average weekly wage of $112.98 as his compensation rate. Brandt v. Stidham Tire Co., 16 BRBS 277, 281 (1984); Vecchiarello v. W. & J. Sloane, Inc., 5 BRBS 78, 85 (1976).

E. Medical/Surgical Benefits

Pursuant to Section 7(a) of the Act, the employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. In order for Employer to be liable for Claimant's medical expenses, the expenses must be reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255 (1984). Section 7 does not require that an injury be economically disabling in order for Claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.

An employer found liable for the payment of compensation is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. Perez v. Sea-Land Services, Inc., 8 BRBS 130 (1978). Entitlement to medical benefits is never time-barred where a disability is related to a compensable

injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1986). If a work injury aggravates, exacerbates, accelerates, contributes to, or combines with a previous infirmity, disease or underlying condition, the entire resultant condition is compensable. See Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986).

In the present matter, Employer/Carrier have refused to authorize certain medical treatment, including a bone scan which was recommended by Dr. Beaudry, Claimant's treating physician. When Claimant last treated with Dr. Beaudry on February 2, 2000, Dr. Beaudry recommended a bone scan, which would determine whether or not the injuries sustained to Claimant's extremities had resulted in post-traumatic inflammatory arthritic changes. (EX-A, p. 27; EX-D, p. 16). Dr. Beaudry further explained that this procedure would determine what had transcended and changed in Claimant's ankle and foot over the course of the three or four years since the previous diagnostic tests were run. (EX-D. p. 18).

On the other hand, Dr. Perlman, who examined Claimant once on December 5, 1998, concluded that further testing, including a bone scan, would not be necessary. (EX-B, p. 13). Dr. Haig did not offer an opinion as to whether a bone scan was necessary or reasonable.

In light of the foregoing medical evidence, I accord greater probative weight to the opinion of Claimant's treating physician, Dr. Beaudry, regarding the necessity and reasonableness of a bone scan to further determine the extent of Claimant's condition. Given the fact that Dr. Beaudry has examined and evaluated Claimant more frequently and thoroughly over time than Dr. Perlman, who examined Claimant only one time, I find that the bone scan is a reasonable and necessary medical expense which is related to the work injury of September 28, 1996. Accordingly, I find Employer/Carrier to be liable for any and all such expenses, including the recommended bone scan, arising from the September 28, 1996 work injury.

F. Overpayment or Credit on Compensation Paid

Employer/Carrier have paid temporary total disability benefits from October 1, 1996 through May 21, 1998 at a compensation rate of $299.87 per week for 86.857 weeks or a total of $26,045.81 and permanent partial scheduled disability of $15,368.34 based on a compensation rate of $299.87, (EX-F). Because Employer/Carrier has overpaid compensation to Claimant, they are entitled to a credit. Any overpayment/credit due can be adjusted through future, additional compensation payments.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer paid Claimant temporary total disability compensation benefits from October 1, 1996 through March 4, 1998. In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[3] Since Employer controverted Claimant's right to compensation, Employer had an additional fourteen days to file with the deputy commissioner a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n.3 (1981).

Since Employer's notice of controversion, which was filed on January 20, 1999, was not filed within 14 days after compensation became due, and since the District Director has made no determination that Employer's failure to comply with Section 14(e) was beyond its control, I find that Claimant is entitled to a 10% penalty which attaches to the disability compensation benefits to be paid to Claimant. This penalty began accruing the first day on which Employer could have filed a timely notice of controversion (April 1, 1998), 28 days after Employer ceased disability compensation payments on March 4, 1998) and tolled when Employer actually filed its notice of controversion (January 20, 1999).

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy

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[3] Section 6(a) is not applicable since Claimant suffered his disability for a period of more than fourteen days.

have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. See Grant v. Portland Stevedoring Company, et al., 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from September 28, 1996 to March 4, 1998, based on Claimant's average weekly wage of $112.98, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from March 5, 1998 and continuing through present, based on Claimant's average weekly wage of $112.98, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C § 908(a).

3. Employer/Carrier shall pay Claimant the sum of $5,790.23 as compensation for the scheduled permanent partial disability to Claimant’s left and right feet based on an average weekly wage of $112.98 for 51.25 weeks in accordance with the provisions of Section 8(c) of the Act. 33 U.S.C. § 908(c)(4) and (19).

4. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 1998, for the applicable period of permanent total disability. The specific dollar amounts shall be computed by the District Director.

5. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's September 28, 1996 work injury, including the recommended bone scan, pursuant to the provisions of Section 7 of the Act.

6. Employer shall be liable for an assessment under Section 14(e) of the Act from April 1, 1998 through January 19, 1999.

7. Employer shall receive credit for all compensation heretofore paid, as and when paid.

8. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

9. Claimant's attorney shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

ORDERED this 29th day of June, 2000, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge